[APPELLATE CRIMINAL JURISDICTION]
HOWES, J.
March 31, 1938.

NG CHYE GIAT v. REX.

[PENANG MAGISTRATE'S APPEAL No. 12 of 1938]

Criminal law—loan of jewellery—pawning by borrower—whether criminal breach of trust —Penal Code, Section 405.

A loan of jewellery to another does not create any legal trust within the meaning of Section 405 of the Penal Code; even if a promise to return the same within a stated time is given. The mere pawning of the jewellery by the person to whom it is lent will not, therefore, amount to criminal breach of trust as defined in that section.

MAGISTRATE'S APPEAL.

Hume for the Appellant.

W. C. Taylor, Crown Counsel, for the Respondent.

Cur. Ad. Vult.

HOWES, J.—In this case the Appellant was charged that he between the 17th May 1937 and 19th September 1937, at Balik Pulau, being entrusted with certain property, namely jewellery to the value of $1,063/- the property of one Che Nah binte Itam, did commit breach of trust in respect of such property, and thereby committed an offence punishable under Section 406 of the Penal Code.

Shortly, the case for the prosecution as told by Che Nah, the complainant, was that on two previous occasions, about 2½ years, the appellant had borrowed jewellery from her (she could not remember the articles), and had returned them within a week or 10 days.

On the third and present occasion, the Appellant borrowed various articles (which she enumerated) on the 17th May 1937 at the house of her uncle, Haji Hassan, with whom the Complainant lived, at Balik Pulau. She stated that Hassan and a Siamese actor, Nai Yot were present on 17th May 1937; and that on the first occasion when the Appellant borrowed them, her husband Aboobakar and Nai Yot were present. She stated that the Appellant promised to return the jewellery within one week, but as he did not do so, she went to his shop at Bukit Mertajam, P. W. and asked for it. She said that the Appellant said it would be safer to leave the jewellery with him, as he had an iron safe. She agreed to this being done, and did not ask for the jewellery.

It is common ground that on the 19th May 1937, the Appellant pawned five articles of jewellery, Exhibits A to E, with Ng Num, a pawnbroker at Kubang Semang, P. W. for $600/–, in respect of which four pawn tickets (Exhibits F^1 to F^4) were issued. The pawnbroker said he asked the Appellant to whom the jewellery belonged, and the Appellant said they were his own. and that he wanted four tickets so as to redeem them in small sums. The Appellant signed the pledge book, and attached his chop at the request of the pawnbroker, as the value was more than $200/-.

The Complainant did nothing further till she had decided to return to Ipoh on the 15th September 1937.

On 12th September, complainant says she went to Bukit Mertajam to collect her jewellery, but not finding the Appellant there, she went on to Nai Yot's house at Telaga Ayer, where she thought she might find the Appellant. She found Nai Yot who told her that the Appellant had pawned the jewellery and had given the pawn tickets to Nai Yot. Nai Yot produced the 4 pawn tickets (in his evidence, he said from under his mattress, he being sick in bed at the time) and gave them to the complainant.

Subsequently, the complainant went to the pawnshop with Md. Eusope and there saw the Exhibits A to E which she identified as her jewellery and made a report to the police which resulted in the arrest of the Accused. The Exhibits were handed over to the Police by the pawnbroker.

Aboobaker, the husband of the complainant, supported his wife's story that the Appellant had borrowed her jewellery on the two previous occasions in his presence, but said he was not aware of the present loan until the complainant informed him.

Hassan, the uncle of the complainant and a retired police pensioner, said that the Appellant, whom he knew by sight, but not by name, came with a Siamese (whom he identified as Nai Yot) to his house on 17th May 1937 and asked the complainant for a loan of her jewelleries as his (Appellant's) wife was attending a wedding He said that the complainant handed the Appellant 6 articles which he described. He said that the Appellant promised to return them in a week's time.

That is shortly the case for the prosecution, namely, that

(a) the Appellant borrowed the jewellery on the 17th May 1937,
(b) the Appellant pawned the jewellery on the 19th May 1937,
(c) when asked by the complainant for its return, he suggested the jewellery was safer with him, locked in his safe.

On these facts the Appellant was arrested and charged with criminal breach of trust, of which offence he was convicted.

The appellant's advocate has pointed out that these three witnesses for the prosecution are all related, those corroborating the complainant being her husband (who is also interested in the jewellery) and her uncle. Further, that Nai Yot was a great friend of the complainant of

twelve years standing. He has also submitted that the complainant's husband Aboobaker has committed deliberate perjury on swearing that he was not interested in a gold mine with Nai Yot, but when confronted with Exhibit "J" (dated 3rd July 1937), Aboobaker had to admit he was entitled to a share in the sale of the land. With regard to the complainant, he pointed out that her story of the previous loan of jewellery two years before, which she said was lent in the presence of Nai Yot was contradicted by Nai Yot, who stated that he *first* saw the jewellery at Balik Pulau in complainant's uncle's house on 17th May 1937. Moreover, Nai Yot said " he only came to know the Appellant when he followed Lim Phek Cheng to his (Nai Yot's) house ", and had only been friendly with him for about a year.

There was no corroboration of the complainant's story of the previous loan of jewellery to the Appellant, except the evidence of Aboobaker who made the bare statement that the appellant had borrowed jewellery on two previous occasions with his consent and in his presence, but no record was kept of the transactions.

I will now consider the story as told by the Appellant. He said he first met Nai Yot in January 1937 at which time he did not know the complainant. He denied ever having borrowed jewellery from the complainant. He was interested in a land transaction with Nai Yot and Aboobaker—this, in spite of Aboobaker's previous denial, appears now to be admitted.

He says that on 15th April 1937, Nai Yot brought him 4 pawn tickets issued by Ipoh pawnshops (which Nai Yot said related to jewellery belonging to his wife) and asked the Appellant to redeem the pledges before they were forfeited. The Appellant went to Ipoh on 22nd April and redeemed one pair of gold bangles which he identified as Exhibit " B " and one pair of anklets Exhibit " C " at two different pawnshops (both the property of the complainant) and a pair of earring screws. On the redemptions. with his expenses of going to Ipoh, the Appellant says he spent $326.10.

Chee Weng, a pawnbroker of Ipoh, called by the Defence, identified one pair of bangles Exhibit " B ", and one anklet Exhibit " C " as being similar to the articles redeemed on April 22nd, and in cross-examination, said he recognized and could identify the articles, although as regards Exhibit " C " there was nothing peculiar about it. The other Ipoh pawnbroker, Hor Kim Low, however, said he could not recognize the gold anklet Exhibit " C " as the one redeemed on April 22nd, 1937, as he had no knowledge of the transaction excepting for the description in the pledge book.

The Appellant says he kept the redeemed jewellery until May 19th, 1937 on which day Nai Yot brought Exhibits A, B & E (" B " would appear to be a mistake in the record for " D " as, according to the Appellant, he was already in possession of the pair of bangles Exhibit " B "), and asked him to pawn these articles, together with the previously redeemed jewellery, still in the Appellant's possession, in four lots, which the Appellant did for $600/- receiving pawn tickets F^1 to F^4.

Appellant says he handed the tickets and cash, $270/-, (after deducting $330/- for his expenses on the redemption of the previous pawned articles on 22nd April) to Nai Yot.

This, the Appellant says, explains how the tickets were in the possession of Nai Yot when he handed them to the complainant.

Certainly, it is more believable than Nai Yot's statement that the Appellant, on 5th September 1937 " came to my house alone and handed 4 pawn tickets to me for safe keeping with instructions not to tell complainant, because he had pawned her jewelleries."

According to the complainant, the Appellant told her he had a safe, and yet, the Court was asked to believe that the Appellant asked Nai Yot, nearly 4 months after the pawning, to keep these tickets for him, although they might go to show that the Appellant had committed criminal breach of trust, and which tickets Nai Yot kept under his mattress.

If the Appellant's story were true, it was only natural that Nai Yot should have possession of the tickets, which the Appellant says he handed to Nai Yot on the day of the pawning, namely on the 19th May 1937.

In his grounds of judgment, at the end, the Magistrate says:—" I am *inclined* to believe the prosecution " instead of any expression that beyond reasonable doubt the guilt of the Appellant had beer proved.

He seems to have overlooked the perjury of Aboobakar as regards the land transaction; the contradiction of the complainant's evidence by Nai Yot as to his presence at the previous alleged loans to the appellant, two years before the present transaction at a time when Nai Yot did not know the Appellant: and the complainant's statement that she had never pawned any of the Exhibits or lent them to anyone else; whereas, some were identified as having been redeemed at Ipoh on the 22nd April.

With regard to the alibi put up by the Appellant to prove his absence from Balik Pulau on the 17th May when the articles were said to have been lent to him. Whilst I do not consider that much weight could be attached to the alibi, as it was not impossible for him to have been at Pagar Trust and at Balik Pulau the same day, the Magistrate was wrong in expressing the opinion that " the alibi was not pleaded at the earliest possible moment." No doubt, he was thinking of the decision of the English Court of Criminal

Appeal, in which this plea was raised for the first time at a trial after committal, and was never raised at the preliminary inquiry.

In the present case, the Appellant raised his defence at the earliest possible moment, viz, at the summary trial, and as the charge, as regards dates, namely "between the 17th May 1937 and the 19th September 1937," was so vague, the accused could not know on which date the offence was alleged to have been committed, until the prosecution evidence had been given.

A point which appears never to have been considered by the Magistrate, or to have been raised by the advocate for the accused at the trial, was whether, assuming the story of the prosecution was accepted (as it must have been) by the Magistrate, the facts proved constituted the offence of Criminal Breach of Trust.

There are two essential ingredients of this offence, (1) an original trust, and (2) a dishonest appropriation of the trust property. According to *Mayne*, "Criminal Law of India," Third Edition, page 754, "A trust may be defined as any arrangement by which one person is authorised to deal with property for the benefit of another."

In Section 405, in the expression "in any manner entrusted," the word "entrusted" is used in its legal and not in its popular and figurative sense. (*Ghanasham Das* quoted in *Gour's* "Penal Law of India" 5th Edition page 1357). It means that it implies a creation of trust, actual or resultant, as is clear from the illustrations appended to this section. Unfortunately, I have not access to the report of the above-quoted case.

In my opinion, a loan of jewellery to another does not create any legal trust within the meaning of Section 405 of the Penal Code; even if (as alleged in the present case) a promise to return the same in a week's time was given.

In law, the position of the parties is that of bailor and bailee. In the circumstances of this case, as told by the complainant, it was a gratuitous loan or "commodatum;" that is a bailment where a chattel is lent by its owner to the bailee for the express purpose of conferring a benefit upon the latter, without any corresponding advantage to the owner.

How then, can it be suggested that any trust was created in favour of the complainant, or for her benefit? Clearly, if there were no trust, actual or constructive, there can be no breach of trust, whatever other offence the Appellant may have committed, if the story told by the complainant were true; nor a conviction under Section 405.

Had the Appellant as a bailee sold the jewellery, this fact would be evidence of converting it to his own use, but as stated in *Kenny's* "Outlines of Criminal Law" 6th Edition, page 191,

> As to pawning, a distinction must be drawn. If the bailee can show that when he pawned the goods he honestly intended to redeem these subsequently (which might very well be made out by instances of his previous similar conduct), and can also give proof of there having been a full prospect of his getting money enough to carry out this intention, the pawning will not amount to a conversion."

Moreover, as has been pointed out, the pawn-tickets were in the possession of Nai Yot, which indicated an intention by someone to redeem the jewellery.

I am unable to find in the Penal Code or the illustrations thereto or in any reported case, anything to suggest that the mere pawning of chattel by the person to whom it is lent, will amount to criminal breach of trust.

The explanation is doubtless that, under Section 30 (1) of the Pawnbrokers Ordinance (Chapter 216),

> "any person who knowingly and designedly pawns with a pawnbroker anything being the property of another person, the pawner not being employed or authorized by the owner thereof to pawn the same, shall be liable to a fine not exceeding one hundred dollars."

and under Sub-section (2), the Court may order the accused to pay compensation to the owner up to the value of the pledge. Hence the absence of any such provision in the Penal Code.

The main ground of appeal is that the conviction was against the weight of evidence.

Whilst the appeal is really one against a finding of fact, and in the ordinary course this Court would be reluctant to interfere, not having seen the demeanour of the witnesses, the Magistrate does not, in my view, appear to have given sufficient consideration to the discrepancies in the evidence for the prosecution (to which I have already referred) or to have considered probabilities. To my mind, it is difficult to believe that a Malay woman would have lent a Chinese jewellery of the value of $1,063/- without some acknowledgment in writing or a payment for the loan. Further, the possession of the pawn tickets by Nai Yot was, in my view, inconsistent with the prosecution story. It is unbelievable that, if the Appellant was acting dishonestly, he would have handed these to an old friend of the complainant, and thus have furnished evidence against himself; whereas, if the Appellant's story was true, Nai Yot would be the very person in whose possession the pawn tickets would be.

Whatever view is taken of the evidence, I am satisfied that it did not justify a conviction for criminal breach of trust; and even if I were disposed to accept the prosecution story *in toto* (which I am not), this is not a case in which I should consider altering the conviction to one of lesser offence. The complainant was represented at the trial by an advocate to conduct the prosecution, who should have considered what offence the evidence would disclose.

The appeal is allowed and the conviction quashed.

Conviction quashed.

[ORIGINAL CIVIL JURISDICTION]
TERRELL, J.
April 11, 1938.
[SINGAPORE SUIT No. 5 of 1937]

A. E. BEAVIS Vs. FOO CHEE FONG.

Costs—principles of taxation.

A Plaintiff obtained judgment against a Defendant for costs on both claim and counterclaim. The amount recovered on the claim was under $5,000; but the amount of the counterclaim exceeded $5,000.

Held that the Plaintiff was entitled to costs on the claim on the lower scale only; and to costs on the counterclaim on the higher scale, but that the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it.

Medway Oil & Storage Co. Ltd. v. *Continental Contractors Ltd. & ors.* (1929) A.C. 88 followed.

Held also that $500 is an extreme figure for the getting up fee where the amount at issue is less than $5,000; though in exceptional cases this figure may be exceeded.

Held also that in allowances for attendances in Court for a "day" (item 189 in Schedule C to the Rules of the Supreme Court) a day covers the normal sitting of the Court from 10.30 or 11.00 a.m. to 4 p.m. and if this period is substantially (but not merely slightly) exceeded an extra allowance should be made proportionately.

Held further that where an order allows a party a proportion only of his taxed costs e.g. one half of his taxed costs generally he is to be allowed only one half of his profit costs and one half of his disbursements.

SUMMONS IN CHAMBERS.

Mark Morrison for Plaintiff.

John Laycock for Defendant.

In this case the Plaintiff brought an action for damages claiming a sum greatly in excess of $5,000; and the Defendant counterclaimed for a sum also admitted to be in excess of that amount.

The case went to the Court of Appeal and as a result of the appeal the Plaintiff obtained Judgment against the Defendant for $4,200 on the claim and Judgment on the counterclaim. The Court of Appeal allowed the plaintiff one half of his taxed costs of the claim and counterclaim.

The Plaintiff brought in objections to the taxation of his bill.

Cur. Ad. Vult.

TERRELL, J.—The objections by the Plaintiff to the taxation of his Bill fall under two heads:—

(a) the allowance of $1,020 for instruction for trial, etc., and
(b) the hearing fees on the seven days of the hearing.

As regards (a), it would appear that the learned Registrar ruled that the claim, upon which $4,200 was recovered, should be taxed on the lower scale, and the counterclaim, in which the defendant failed to recover $16,000, on the higher scale. This ruling is I think correct. The sum of $1,020 was allowed as the getting up fee for both claim and counterclaim as a single item. The learned Registrar has however stated that he has allowed $700 in respect of the claim and $320 in respect of the counterclaim. The getting up fee should bear some relation to the amount, and the importance of the issue, involved, and generally speaking $500 is an extreme figure for the getting up fee where the amount at issue is less than $5,000, whatever be the work involved. In exceptional cases this figure may be exceeded as it has in this case. The getting up fee on the counterclaim has been allowed at $320, and in view of the ruling in *Medway Oil & Storage Co.* v. *Continent Contractors*, (1929) A.C. p. 88, that the unsuccessful defendant, where a counterclaim is dismissed, should only be called on to pay the amount by which the costs of the original action have been increased, I think it was correct to allow a smaller sum for the getting up fee on the counterclaim, notwithstanding that it was on the higher scale. I might myself have apportioned the $1,020 somewhat differently, namely $600 for the claim and $420 for the counterclaim, but it is entirely a matter of discretion, and the learned Registrar's opinion is just as likely to be correct as my own.

In arriving at the amount of the getting up fee I do not think it desirable to enquire from Counsel the number of days and hours during which he was engaged in the work. I think it is almost impossible to give a correct answer. The proofs of witnesses are of course relevant, and so are the issues of law involved, but I think that a taxing master should be chiefly guided, as I have said, by the amount at stake and the importance of the issues involved. If he attempts to establish an arbitrary scale dependent on the number of days or hours worked, the final result may be either too large or too small and in either case the Registrar's discretion will be unduly fettered.

As regards (b), one of the Plaintiff's objections seems to be that even if the original claim had only been for $4,200, as soon as a counterclaim for $16,000 had been presented, counsel's efforts would have been on a higher